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No. 03-1074

IN THE

Supreme Court of the United States

BRONX LEGAL SERVICES,

Petitioner,

v.

LEGAL SERVICES FOR NEW YORK CITY AND THE LEGAL SERVICES CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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March 2004

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QUESTIONS PRESENTED

1. Whether the district court abused its discretion by denying a request for leave to amend a complaint where the plaintiff never moved to amend its complaint, never submitted a proposed amended pleading, and never identified any new allegations that might be sufficient to save one or more of its claims from dismissal.

2. Whether the antitrust laws apply to a decision by a non-profit grantmaking organization not to renew a grant.

PARTIES TO THE PROCEEDING AND RULE 29.6 CORPORATE DISCLOSURE STATEMENT

The parties to the proceeding are named in the caption. Respondent The Legal Services Corporation is a not-for-profit corporation established by federal statute. Respondent Legal Services for New York City is also a not-for-profit corporation. Neither Respondent has a parent corporation, and neither has issued stock to the public.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

STATEMENT OF THE CASE

This case concerns Petitioner's asserted legal entitlement to a portion of future grant monies distributed by Respondent The Legal Services Corporation ("LSC") to its grantee Respondent Legal Services for New York ("LSNY"). LSC is a federally-chartered, non-profit corporation that makes federal grants each year for the purpose of "providing financial support for legal assistance in noncriminal proceedings or matters to persons financially unable to afford legal assistance." 42 U.S.C. § 2996b(a). For many years, Petitioner Bronx Legal Services ("BLS") received LSC grant monies via LSNY, a New York non-profit corporation and LSC grant recipient that helps to coordinate legal services delivery in New York City. In 2002, LSNY informed BLS

that BLS's funding would not be renewed the following year due to BLS's failure to comply with new program requirements, and that future LSC grant monies would instead be awarded to a different entity. BLS brought this lawsuit alleging that, as the incumbent recipient of LSC funding through LSNY, BLS had a legal entitlement to any future LSC grant monies that are expended to assist indigent persons in Bronx County, New York. BLS made this claim even though the governing statute stipulates that "[n]o person or entity that was previously awarded a grant" of LSC monies "may be given any preference" in the grantmaking process. Pub. L. No. 104-134, § 503(e), 110 Stat. 1321-52 (1996). The district court dismissed BLS's complaint for failure to state a claim, and the court of appeals unanimously affirmed that decision in an unpublished summary order.[1]

1. The dispute. LSNY is the LSC grant recipient for New York City. For many years, LSNY awarded BLS a portion of its LSC grant monies to enable BLS to provide free legal services to indigent persons in Bronx County. LSNY allocated other portions of its LSC grant monies to other legal services organizations operating in different parts of New York City.

As part of a nationwide, congressionally-mandated effort to improve quality and accountability in federally-funded legal services programs, LSNY announced in November 2001 that it intended to reorganize how it

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[1] This is the second lawsuit initiated by BLS against LSC and LSNY to reach the Court this Term. In the first action, BLS sued LSC and LSNY in an effort to avoid disclosure of certain information required under federal law. The district court granted summary judgment in favor of LSC and LSNY; the Second Circuit affirmed; and this Court denied BLS's petition for a writ of certiorari. *Bronx Legal Servs. v. Legal Servs. Corp.*, No. 00 CIV 3423, 2002 WL 1835597 (S.D.N.Y. Aug. 8, 2002), *aff'd*, 64 Fed. Appx. 310 (2d Cir.) (unpublished decision), *cert. denied*, 124 S. Ct. 805 (2003).

distributes LSC funds to legal services organizations. LSNY's reorganization plan called for grant recipients to be reconstituted as single-member corporations, with LSNY as the sole member of each corporation. When BLS rejected LSNY's reorganization plan, LSNY advised BLS that its funding would not be renewed the following year.

2. Proceedings in the District Court. BLS commenced this lawsuit against LSNY and LSC on August 5, 2002, seeking to prevent LSNY from implementing its reorganization plan and terminating BLS's funding. BLS alleged that LSNY's plan violated the federal LSC Act, federal and state antitrust statutes, the New York Judiciary Law, the common law of fiduciary duty and tortious interference, and the First Amendment to the U.S. Constitution. LSNY answered and moved for judgment on the pleadings under Fed. R. Civ. P. 12(c), while LSC moved to dismiss the complaint under Fed. R. Civ. P. 12(b)(6). At the end of its brief in opposition to Respondents' motions, BLS wrote: "if the court should determine that any of the claims at issue is deficient, then plaintiff requests leave to amend." BLS did not identify any specific new allegations that would overcome the multiple deficiencies in its Complaint that were identified in Respondents' motions; nor did BLS formally move to amend its complaint or submit a proposed amended pleading. Respondents argued in reply that any amendment would be futile. On December 4, 2002, the district court heard more than four hours of oral argument, during which BLS again failed to identify any specific new allegations in support of its claims. Shortly thereafter, BLS moved for a preliminary injunction preventing LSNY from terminating its funding.

In an unpublished decision dated January 17, 2003, the district court granted Respondents' motions in their entirety. Pet. at 4a-22a. The court held that (1) BLS had failed to allege a violation of the LSC Act, *id.* at 8a; (2) BLS's federal and state antitrust claims have no

application to the type of charitable grants from one non-profit entity to another that are described in BLS's complaint, *id.* at 11a-12a; (3) BLS's conclusory claim of "retaliation" under the First Amendment was contradicted by the factual allegations in its complaint, *id.* at 14a, 17a; (4) BLS lacked standing to assert a claim under the New York Judiciary Law, *id.* at 18a; and (5) BLS's two common law tort claims failed to allege essential elements, *id.* at 20a-21a. The district court denied BLS's motion for a preliminary injunction as well as BLS's request for leave to amend. *Id.* at 22a n.11.

The district court entered judgment on January 23, 2003. BLS did not seek to reopen the judgment under Rule 59 or set aside the judgment under Rule 60 in order to submit an amended complaint.

3. The Court of Appeals' Decision. On appeal to the United States Court of Appeals for the Second Circuit, BLS challenged the dismissal of its claims and the denial of its preliminary injunction motion. In the final two paragraphs of its 49-page opening brief, BLS asserted that the district court abused its discretion by denying BLS's request for leave to amend. In its briefs to the court of appeals and at oral argument, BLS again identified no specific new allegations in support of its claims.

The court of appeals unanimously affirmed in a three-page, unpublished summary order. Pet. at 1a-3a. Noting that BLS never moved to amend its complaint, never submitted a proposed amended pleading, and never explained in its briefs or at oral argument how it proposed to remedy the defects in its complaint, the court of appeals ruled that, "[i]n the circumstances presented," the district court did not abuse its discretion in denying BLS's request for leave to amend. *Id.* at 2a-3a.

BLS's funding through LSNY expired effective December 31, 2002. Since that time, LSNY has distributed

LSC grant monies to a different legal services organization that serves indigent persons in Bronx County. BLS's complaint sought only declaratory and injunctive relief that would halt the reorganization and prevent its funding from being terminated; BLS did not seek money damages.

REASONS FOR DENYING THE WRIT

I. THE SECOND CIRCUIT PROPERLY HELD THAT THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING BLS LEAVE TO AMEND ITS COMPLAINT.

BLS asks the Court to grant certiorari for the purpose of holding that a district court may not deny a request for leave to amend a complaint "simply because the plaintiff did not submit a proposed amended complaint." Pet. at i. That issue is not presented in this case. BLS's failure to submit a proposed amended complaint was just one aspect of BLS's pervasive failure to explain to either court below, in any way or at any time, how an amended complaint could overcome the many deficiencies in its original complaint. Because BLS failed to identify any factual allegations that would allow it to survive a motion to dismiss, the courts below properly denied leave to amend on grounds of futility. None of the asserted circuit splits that BLS discusses in its petition arises in this case. Rather, the court of appeals' decision is consistent with the decisions of this Court and the courts of appeals holding that leave to amend may be summarily denied where it is apparent from the record that it would be futile.

A. The Court Of Appeals Did Not Affirm The Denial Of Leave To Amend "Simply Because The Plaintiff Did Not Submit A Proposed Amended Complaint."

BLS's petition is constructed upon a single, flawed premise: that the court of appeals affirmed the district

court's denial of BLS's request for leave to amend *solely* because BLS failed to submit a proposed amended complaint. Pet. at i.[2] As reflected in the court of appeals' decision and the course of proceedings in the district court, the decisions below did not turn solely on BLS's failure to submit a proposed amended pleading. Rather, the decision to deny leave to amend was based on BLS's pervasive failure to identify any specific new allegations that BLS might offer to cure the multiple deficiencies in its complaint.

In affirming the district court's denial of leave to amend, the court of appeals made clear that its decision was based on BLS's entire course of conduct during the proceedings below. The court of appeals observed that BLS "gave the Court *no reason* why it should be entitled to amend." Pet. at 2a (emphasis added). The court of appeals noted that BLS's request to the district court was made "without offering any proposed amendments," but the court of appeals added that "[e]ven now, in their appellate briefs, plaintiff does not tell us exactly what it might allege in an amended complaint that would cure the deficiencies in its pleadings." *Id.* Accordingly, "[i]n the circumstances presented," the court correctly declined to set aside the

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[2] BLS repeats this mischaracterization of the court of appeals' decision throughout its petition. *See* Pet. at 9 (the court of appeals "affirmed the district court's decision on the ground that BLS had failed to present a proposed amended complaint when it requested leave to amend"); *id.* at 12 (leave to amend was denied "simply because the plaintiff did not submit a proposed amended pleading at the time it requested leave to amend"); *id.* at 14-15 (the court of appeals "summarily affirmed the [district] court's decision on the ground that BLS had failed to present a proposed amended complaint when it requested leave to amend") *id.* at 17 ("[s]ince there is no explicit requirement in Rule 15(a) for a litigant to submit a proposed amended pleading as a condition for obtaining leave to amend, it was improper for the Second Circuit to engraft such a requirement onto the Rule").

district court's denial of BLS's entirely "unsubstantiated request for leave to amend." Pet. at 3a.

As the court of appeals' decision reflects, at every turn BLS failed to explain why an amended complaint would be anything other than an exercise in futility. BLS did not file an amended complaint in response to the numerous pleading deficiencies identified in Respondents' motions to dismiss, nor did it proffer any new allegations in the responsive brief that it did file. During the four-hour oral argument before the district court, BLS elected to stand on the allegations in its complaint. Following dismissal of its complaint, BLS opted to appeal rather than avail itself of either of the established mechanisms for seeking to amend a complaint following entry of judgment: a motion to alter or amend the judgment under Rule 59, or a motion for relief from the judgment under Rule 60.[3] In its briefs and oral argument on appeal, BLS again never explained how it might cure the numerous substantial deficiencies in its pleadings. Pet. at 2a.

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[3] These mechanisms are described in several of the decisions that BLS cites in its petition, including this Court's decision in *Foman v. Davis*. *See, e.g.*, *Foman v. Davis*, 371 U.S. 178, 182 (1962) (reviewing the "denial of petitioner's motion to vacate the judgment in order to allow amendment of the complaint"); *Calderon v. Kansas Dep't of Social & Rehabilitation Servs.*, 181 F.3d 1180, 1185 (10th Cir. 1999) ("If a party seeks to amend a pleading following the court's grant of a motion to dismiss, the party must first move to reopen the case under Fed. R. Civ. P. 59(e) or 60(b) and then file a motion under Fed. R. Civ. P. 15 for leave to amend"); *Acevedo-Villalobos v. Hernandez*, 22 F.3d 384, 389 (1st Cir. 1994) (explaining that following dismissal without leave to amend, a plaintiff may still "seek leave to amend under Rule 15(a) after having the judgment reopened under either Rule 59 or 60"); *Glenn v. First Nat'l Bank in Grand Junction*, 868 F.2d 368, 369 (10th Cir. 1989) (noting that "[a]ppellants did not file a motion for leave to amend under Fed. R. Civ. P. 15, nor a motion to alter or amend the judgment under Fed. R. Civ. P. 59(e), nor a motion for relief from a judgment for mistake under Fed. R. Civ. P. 60(b), nor any other motion").

Accordingly, this case does not present the question whether leave was properly denied "simply because the plaintiff did not submit a proposed amended complaint when it requested leave to replead." Pet. at i. The actual circumstances of this case are that BLS failed to (i) move to amend its complaint, (ii) submit a proposed amended pleading, (iii) identify any specific new allegations in its written submissions to the district court or during a lengthy oral argument, (iv) file a motion under Rules 59 or 60 to amend or reopen the judgment in order to file an amended complaint, and (vi) identify to the court of appeals how it might have amended its complaint to cure the complaint's multiple deficiencies. The court of appeals correctly ruled that "[i]n the circumstances presented," the district court did not abuse its discretion in denying leave to amend. Pet. at 3a.

B. None Of The Circuit Conflicts Discussed In BLS's Petition Is Presented In This Case.

Asserting that the courts of appeals are divided on three separate issues concerning practice under Fed. R. Civ. P. 15(a), Pet. at 18-22, BLS asks the Court to use this case to "provide guidance to litigants" regarding "the proper procedure to be followed for obtaining leave to amend a complaint" when faced with a motion to dismiss pursuant to Rule 12(b)(6). *Id.* at 22. Because none of the three issues identified by BLS is presented here, this case does not provide an appropriate vehicle for addressing any of them.

BLS first asserts that the courts of appeals are divided over "whether a litigant must request leave to replead in the district court in order to file an amended complaint following a Rule 12(b)(6) dismissal." Pet. at 20. That issue is not presented in this case because BLS *did* request leave to replead, and never sought to file an amended complaint without leave of court or asserted in the courts below that it was entitled to do so.

Next, BLS contends that the courts of appeals have "split on the issue of how a dismissal pursuant to Rule 12(b)(6) affects a party's right to amend a pleading 'as of right' under Rule 15(a) prior to service of a responsive pleading." Pet. at 20. At no time during this proceeding, however, has BLS contended that it was entitled to amend its complaint "as of right" following dismissal. Rather, in its opposition to Respondents' motions to dismiss, BLS simply requested "leave to amend" in the event the district court determined that its claims were deficient. When leave was denied, BLS did not assert that it was entitled to file an amended complaint "as of right"; nor did BLS move to amend the judgment under Fed. R. Civ. P. 59, or seek relief from the judgment under Fed. R. Civ. P. 60 on that basis. Instead, BLS appealed, arguing that the district court *abused its discretion* in denying leave to amend — while acknowledging that "the district court has the discretion to deny leave if there is a good reason for it." C.A. Br. 47. Accordingly, neither the district court nor the court of appeals had any occasion to consider whether BLS might have been entitled to amend its complaint "as of right." Because this issue was neither raised nor considered below, it is not properly presented in BLS's petition.

Finally, BLS identifies "a split among the circuits (and even within circuits)" regarding whether a district court may deny leave to amend where "a litigant requests leave to amend in the event a Rule 12(b)(6) motion to dismiss is granted but fails to provide the district court with a copy of the proposed amendment." Pet. at 21. As discussed above, however, the court of appeals did not hold that a plaintiff's failure to tender a proposed amended complaint alone is grounds for denying leave to amend. Rather, the court of appeals' determination was based on BLS's persistent failure, during more than a year of proceedings, to identify any specific new allegations that might salvage one or more of its claims. Because the issue of whether a district court may

deny leave to amend based solely on a plaintiff's failure to submit a proposed amended pleading was not before the courts below, it is not properly presented here.

C. The Decision Of The Court Of Appeals Is Consistent With This Court's Holding That Leave To Amend May Be Denied If Amendment Would Be Futile.

The decision of the court of appeals is fully in accord with this Court's holding that denial of leave to amend is proper when it is apparent from the record that amendment would be futile. In *Foman v. Davis*, 371 U.S. 178 (1962), the Court held that "futility of amendment" is a proper reason for denying leave to amend. *Id.* at 182. In light of BLS's persistent refusal to articulate any specific new allegations that BLS believed might salvage even one of its claims, the court of appeals reasonably concluded that the district court did not abuse its discretion in denying leave to amend.[4]

To the extent that BLS's petition suggests that the decision below should be set aside because requests to amend – even if unexplained – may not be summarily denied, that argument runs counter to the Court's holding in *Foman* and to uniform rulings of the courts of appeals. As the Court explained in *Foman*, leave to amend may be denied for any proper reason, whether that reason is "apparent or declared."

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[4] BLS's petition discusses four other decisions of the Court that address the "notice pleading" requirements that arise under Fed. R. Civ. P. 8. *See* Pet. at 9-10 (*citing Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002); *Leatherman* v. *Tarrant County*, 507 U.S. 163 (1993); *Hishon v. King & Spalding*, 467 U.S. 69 (1984); and *Conley v. Gibson*, 355 U.S. 41 (1957)). BLS's complaint was dismissed pursuant to Rule 12(b)(6), not Rule 8. The "notice pleading" requirements of Rule 8 cannot excuse BLS's persistent failure, before both courts below, to identify any specific allegations that might save one or more of its claims from dismissal.

Foman, 371 U.S. at 182. The courts of appeals have uniformly held that a summary denial of a request for leave to amend may be affirmed so long as a proper reason is apparent from the record.[5]

BLS hints that somewhere within the hundreds of pages that it submitted in support of its preliminary injunction motion lay new allegations that could have cured "most of [the] purported deficiencies" in its complaint, Pet. at 14, but that the district court never considered those new allegations. *Id.* at 8. As the court of appeals noted, however, BLS repeatedly failed to identify for the courts below what those "new" allegations might be. Pet. at 2a. Moreover, BLS is plainly wrong when it asserts that "[t]here was no indication that the district court, in determining whether the motion to dismiss should be granted, ever considered any of the substantial evidence that BLS had submitted in support of its preliminary injunction motion." Pet. at 8. Indeed, the district court *cited* to BLS's preliminary injunction papers in its opinion, Pet. at 16a n.8 – a fact that is omitted from BLS's petition.

Given the choices that BLS and its counsel made below, the court of appeals correctly concluded that the district court did not abuse its discretion in denying BLS leave to amend. That decision does not conflict with any decision of this Court or any other court of appeals. Nor

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[5] *Correa-Martinez v. Arrillaga-Belendez*, 903 F.2d 49 (1st Cir. 1990); *Gurary v. Winehouse*, 235 F.3d 792 (2d Cir. 2000); *Lake v. Arnold*, 232 F.3d 360 (3d Cir. 2000); *Edwards v. City of Goldsboro*, 178 F.3d 231 (4th Cir. 1999); *Leffall v. Dallas Independent School Dist.*, 28 F.3d 521 (5th Cir. 1994); *Jet, Inc. v. Sewage Aeration Sys.*, 165 F.3d 419 (6th Cir. 1999); *Sanders v. Venture Stores, Inc.*, 56 F.3d 771 (7th Cir. 1995); *Hammer v. City of Osage Beach*, 318 F.3d 832 (8th Cir. 2003); *Roth v. Garcia Marquez*, 942 F.2d 617 (9th Cir. 1991); *Pallottino v. City of Rio Rancho*, 31 F.3d 1023 (10th Cir. 1994); *Confederate Mem'l Ass'n, Inc. v. Hines*, 995 F.2d 295 (D.C. Cir. 1993).

does the court of appeals' ruling, which was issued against the backdrop of the fact-bound procedural history of a particular dispute, have any far-reaching implications for other parties. No further review is warranted.

II. THE COURT OF APPEALS CORRECTLY CONCLUDED THAT THE ANTITRUST LAWS DO NOT PROHIBIT LSNY FROM DECLINING TO RENEW ITS GRANT TO BLS.

The court of appeals affirmed the district court's dismissal of BLS's antitrust claims on two independent grounds: *first*, that the acts complained of did not involve trade or commerce, and therefore fall outside the scope of the federal antitrust laws; and *second*, that none of the harms about which BLS complained constituted antitrust injury. Pet. at 24; *id.* at 11a-12a. Both rulings are correct and do not conflict with any decisions of this Court or any other court of appeals. Accordingly, no further review is warranted.

Notably missing from the petition is any allegation of a circuit split over whether a charitable grant is non-commercial activity for purposes of the antitrust laws, or whether a non-profit organization such as BLS can suffer antitrust injury from the non-renewal of a charitable grant. Nor does BLS challenge the legal principles applied by the courts below.[6] Instead, BLS asks the Court to review whether the courts below applied rules of law that BLS

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[6] *E.g.*, Pet. at 25 (acknowledging that "the district court recognized that 'non-profit organizations are not per se entitled to exemption from the Sherman Act' and that 'a court will examine the nature of the conduct of the non-profit organization and the totality of the circumstances in determining if a transaction is business or commercial, and thus subject to Sherman Act liability'"; and noting that "[t]he court also recognized that 'the exchange of money for services is the hallmark of a commercial transaction'" (internal citations and emphasis omitted)).

admits are correct to reach conclusions that BLS asserts "were erroneous." Pet. at 24. BLS's petition thus challenges only the "misapplication of a properly stated rule of law," Sup. Ct. R. 10, a question that does not warrant review by this Court.

The conclusion of the courts below that the grants at issue do not involve "trade or commerce" is faithful to this Court's instruction that preserving "[b]usiness competition" is the focus of the antitrust laws. *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 493 n.15 (1940). The two lower court decisions cited in BLS's petition, Pet. at 26-27, make this very point.[7] In each of those cases, the "trade or commerce" requirement was met because educational institutions received substantial sums of money in return for the services that they provided. Here, LSC and LSNY do not receive any similar economic benefit from BLS in exchange for the grants. If mere speculation that a grantmaking entity must have received "something" of value in exchange for a grant, Pet. at 26, is sufficient to bring the antitrust laws into play, then *every* philanthropic gift would be subject to scrutiny under the Sherman Act.

Finally, the court of appeals' determination that BLS failed to allege "antitrust injury" accords with the Court's observation that the antitrust laws "were enacted for 'the protection of competition not competitors.'" *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977). Protection from competitors is precisely what BLS seeks. BLS alleged that for more than twenty years it had been "the *only* legal service organization providing LSC-funded legal services to indigent persons in the Bronx," and that "[t]o the

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[7] *Hamilton Chapter of Alpha Delta Phi, Inc. v. Hamilton College*, 128 F.3d 59 (2d Cir. 1997); *United States v. Brown University*, 5 F.3d 658 (3d Cir. 1993).

extent that [LSC and other funds] are intended for the purpose of providing free legal services to indigent persons in the Bronx, *such funds should properly be awarded to BLS*."[8] BLS is not seeking to protect competition for the benefit of consumers, but to protect itself from competition. The "injury" BLS complains of is thus the antithesis of antitrust injury.[9]

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

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[8] Compl. ¶¶ 66, 67 (emphasis added).

[9] Respondents also sought dismissal on the grounds that the acts complained of do not have the requisite effect on interstate commerce and that BLS failed to allege a relevant product market. The courts below did not reach these additional reasons for rejecting BLS's antitrust claims.

Respectfully submitted,

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